IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

HELD AT CAPE TOWN CASE NO 10/1998

In the matter between

SOUTH AFRICAN COMMERCIAL CATERING AND ALLIED WORKERS UNION FIRST APPLICANT

PATRICK NKATU AND OTHERS SECOND TO FORTY-SEVENTH APPLICANTS

and

IRVIN AND JOHNSON LIMITED SEAFOODS DIVISION FISH PROCESSING RESPONDENT

JUDGEMENT

NICHOLSON JA

[1] The applicants sought an order that two of the judges, Conradie J A and Nicholson JA, due to hear an appeal on 31 August 1999 with Mogoeng AJA against a determination by the industrial court in terms of section 46(9) of the Labour Relations Act, 28 of 1956, (>the Nkatu appeal=) recuse themselves. The determination by the industrial court was that the 46 appellants= dismissal by the respondent on 2 August 1995 did

not constitute an unfair labour practice. It is necessary to briefly set out the background to the present application.

[2] The respondent conducts a seafood processing operation at its premises in Davison street, Woodstock. It has a long standing relationship of some 15 years with the Food and Allied Workers= Union (AFAWU@) and there is a recognition agreement with it as it is the majority union. A rival union, the first applicant herein, commenced recruiting members and on 12 January 1995 wrote to the respondent requesting a meeting to discuss the verification of its membership. On 20 January such a verification exercise was held and it established that FAWU represented 49.86% and first applicant 11.17% of the bargaining unit. A second verification exercise was held and the corrected results established on 11 April 1995 that 55.89% adhered to FAWU and 26.15% declared allegiance to first applicant. There has been intense rivalry between the unions in their quest for membership.

[3] Applicants believed that the respondent favoured FAWU over and above first applicant and that subsequent events bore out such favouritism. FAWU and the first applicant are both affiliated to COSATU and on 5 April 1995 the latter advised the respondent that a commission was being set up to investigate the allegations of violence

and intimidation which were being bandied about between the two unions. Nothing appears to have come of this though COSATU resolved in September that the first appellant withdraw from the respondent in the light of its >one union one industry= philosophy.

[4] On 15 June Patrick Nkatu (ANkatu@), the second applicant herein, approached the respondent=s Mark Anema (AAnema@) on behalf of the first applicant requesting permission for a lunch time march to present a petition to the respondent. The petition addressed the allegedly inconsistent manner of handling discipline and demanded the immediate reinstatement of one Samuel Petersen as it was believed he had been unfairly dismissed. The second demand was for the right of access for first applicant=s officials to the premises of the respondent. The respondent was given three days to respond, failing which the protesters threatened to >take action=. The response of the respondent was that Petersen had been dismissed after proper compliance with the disciplinary code and that its attitude concerning access was a matter of public record, given the minority status of the first applicant. The company deprecated the tone of the petition.

[5] On Monday 19 June the first applicant=s members heeded a call for a

national stay-away by COSATU. On 21 June the respondent initiated an investigation into the absenteeism on 19 June and called in individual workers to account for their absence. The persons took exception to this and suggested that those who took part should be dealt with collectively as their action had been collective in nature.

[6] Nkatu then obtained permission to have a meeting of the first applicant=s members during lunch on 21 June. At this meeting it was resolved to march to the general manager=s office on that day at15h00. Anema received a phone call from Nkatu in which the latter, on Anema=s evidence, demanded the reinstatement of Petersen and Maqekeza, another employee recently disciplined, and access to the facilities at the factory for the first applicant. If these demands were not met then production would not continue. The march consisted of some 200 persons who encountered three FAWU shop stewards Richard Antoni, Ivan Jeremiah and Angeline Williams. There is a dispute about who the aggressors were at this stage. Antoni was subsequently killed on 29 August 1995 while on his way home. His assailants have never been identified or apprehended. His statement was admitted as evidence. The evidence of the three shop stewards painted a picture of the 200 members of the first applicant armed with an assortment of

weapons including sticks, metal poles, bin hooks and knives pushing past them and assaulting two of them including stabbing them.

[7] Individual appellants testified that, apart from the confrontation with the FAWU shop stewards (in which it was said that two of the first applicant=s members had been stabbed), the march was a peaceful one with the legitimate purpose of handing a demand to Carlin, the respondent=s general manager, and that there were no threats or intimidation. In the heads of argument their counsel summarise the position as follows Awhen the marchers were in the corridor, three FAWU shop stewards approached the march from the opposite direction. A confrontation ensued between the marchers and two of the three FAWU shop stewards. Chaos ensued during which >people started running=. The marchers split and reassembled, having armed themselves with bin hooks and various other objects.@

[8] The version of witnesses called by the respondent was that after the incident involving the FAWU shop stewards members of the crowd of workers moved through the production areas brandishing their weapons and any person still intent on working was coerced out of the factory. Management decided at about 4.30 pm that all staff should go

home. The remaining employees were given a notice requesting them to leave the premises by 8pm which they acceded to.

[9] Following an investigation by the respondent 188 of the first applicant=s members were suspended. There was a mediation process as a result of which 134 employees were suspended for 4 months without pay and were issued with final written warnings. The remaining 46 employees faced disciplinary hearings. They were dismissed and the appeal due to be heard on 31 August was against that finding.

[10] The dismissal of the 46 employees caused the first applicant to call for protest action outside the respondent=s premises on 25, 29 and 30 August 1995. The respondent dismissed 35 of the protesters, 17 of whom had received final written warnings as being part of the 134 employees mentioned above.

[11] The first applicant brought proceedings in the industrial court for a declaration that the dismissal of the 35 constituted an unfair labour practice and that court reinstated 18 of them - those without final written warnings - and confirmed the dismissal of the 17 employees with written warnings.

[12] The first applicant appealed against the decision upholding the dismissals of the 17 employees and the respondent cross appealed against the refusal to confirm the dismissal of the 18 employees. Judgement was given in that matter (hereinafter referred to as the Nomoyi matter) by Conradie JA, with Froneman DJP, and Nicholson JA concurring, dismissing the appeal by the first applicant and upholding the cross appeal of the respondent. The nett effect of the judgement was that the dismissal of the 35 employees by the respondent was confirmed.

[13] To sum up then - the Nomoyi matter dealt with conduct which occurred later in time namely at the end of August 1995 and the appeal was heard by the judges I have mentioned. The dismissal of the 46 employees related to events earlier in time namely 21 June 1995 and that appeal was due to be heard on 31 August 1999. Broadly speaking the application for recusal is directed at the fact that the unanimous judgement in the Nomoyi matter dealt with the events of 21 June and other background material in setting the scene for the dismissal of the persons for the conduct at the end of August.

[14] The applicants do not suggest that the application addresses any issue apart from the findings in the Nomoyi judgement. In other words, no other ground for recusal such as any prior relationship to any of the parties or any improper motive was advanced. The first submission advanced in the applicants= heads of argument in the appeal proper relates to the fact that there was no proof that each individual employee took part in the march or shared a common purpose with those who did. The case of individuals is also advanced on the basis that there was insufficient evidence to show that they participated in the said march. The second point raised in the heads is that the work stoppage was directed against a refusal by the respondent to deal with the employees collectively and that such refusal was unfair and that no ultimatum was ever issued. In essence the appellants intended to argue that their conduct was justified given the decision to discipline them individually. The third argument addresses the fairness of the disciplinary procedure contained in clause 3.11 of the mediated agreement to deal with the misconduct of 21 June. Finally applicants argue that retrospective reinstatement is the appropriate remedy for the unfair labour practice which took place. None of these arguments were considered in the Nomoyi judgement.

[15] The applicants in this recusal application have cited a number of passages in the judgement in the Nomoyi matter to illustrate the submission that there is a reasonable apprehension that the two judges whose recusal is being sought would be biased against them in the Nkatu appeal. It is important to bear in mind that the Nkatu appeal deals specifically with the events of 21 June 1995. During the hearing of the Nomoyi matter evidence was tendered on behalf of the respondent concerning the events which had taken place on 21 June 1995. That evidence was uncontroverted by the appellants in that matter, including the first applicant herein. The failure to contradict the evidence of the respondent as to the events of 21 June 1995 meant that the evidence of the company had to be accepted where it was not so inherently improbable as to warrant rejection without controverting testimony.

[16] The applicants mention the fact that the judgement in the Nomoyi matter referred to the suspension of >those employees who had misconducted themselves in this manner= on 21 June 1995. After dealing with the protest demonstrations of 25, 29 and 31 August the court held that >It was in this atmosphere of alarm and despondency [on 21 June 1995] that the next demonstration occurred [on 25, 29 30

August 1995]=.

[17] Richard Antoni was murdered at the Heideveld train station and the court held as far as his killing was concerned, as follows >[a]ccording to reports received from Anema, some of the staff at Woodstock were with him at the time of his murder and identified his assailants as members of the group that had caused chaos in the factory on 21 June. These reports were elicited from Anema in cross-examination, so that what would otherwise have been hearsay, became admissible.=

[18] With regard to the demonstrations Conradie JA held that >[j]udging by the measures taken by the respondent, Anema did not, in my view, exaggerate the effect of the demonstrations on the morale of the workforce and on their productivity.= The court also preferred the version of Catto and Anema to the protestors= contention that there was no intention to disrupt the respondent=s business and that care was taken to avoid disruption by letting all the vehicles through the protesting throng.

[19] The court in its judgement referred to the >upheaval of 21 June 1995' and on another occasion stigmatized the events as a >frightening

eruption=. It described the evidence of Zoe Holland as >sophistry=. It also remarked that >compliance with proper procedures and a regard for legal requirements was not sufficiently high on SACCAWU=s agenda...=. Holland was further criticized for her behaviour after receiving information about the High Court interdict in the following terms

> AI find it disturbing that, despite being entitled to the day off, she made no attempt to communicate the terms of the order to any responsible official of SACCAWU. At the very best for Holland, she was guilty of gross dereliction of duty. A high court interdict is not a trifle. A body like a trade union which, through an official, has knowledge of such an interdict is not entitled to take up the stance that it will do nothing to obey the order until it has been served. That seems to have been the SACCAWU attitude.. It behaved irresponsibly in not immediately dispatching an official to Woodstock to ensure that the terms of the interdict were meticulously obeyed...@

[20] With regard to this evidence the court held that >[t]his confrontational attitude is really not out of keeping with that displayed throughout by the demonstrators, by their leaders and by SACCAWU=s officials.= The court went on to hold that >in the light of all these factors, the appellant=s argument that the conduct of the demonstrators was not, and could not have been seen to be, intimidatory, cannot be accepted=.

[21] Conradie JA held that >by disrupting the respondent=s business, SACCAWU could reveal itself as the more powerful and militant union whose demands could only be rejected at the respondent=s peril. It was, it seems to me, determined to build upon the image of the defiant union it had begun to establish in June of that year.=

[22] The present applicants also point out a number of passages in which credibility findings are made in favour of the witnesses of the respondent and record that the judgement was >scathing= of the conduct of the appellants in that matter by stating that >anyone who bedevils industrial relations in this way can expect no sympathy from the courts.=

[23] These, then, are the findings of which the applicants complain to found the submission of their reasonable apprehension of bias. They fall into four categories. Firstly those relating to the events of 21 June, where the appellants in the earlier proceedings had led no evidence at all. The allegations of the applicants are that the judgement criticized the conduct of employees on 21 June. It is clear from the heads of argument that applicants= own counsel described the circumstances as >chaotic= and appears not to challenge that certain employees

misconducted themselves. The second category relates to criticisms of the conduct of first applicant; the third to those critical of Ms Holland=s conduct and finally those dealing with credibility. Prior to dealing with the last three categories of complaint it is necessary to deal with the principles governing recusal applications.

[24] Although the right to a fair trial runs throughout our common law jurisprudence it found majestic form and content in section 34 of the Constitution of the Republic of South Africa, Act 108 of 1996 which provides for the right of everyone >to have any dispute that can be resolved by application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum=.

[25] It is clear from the authorities that in an application for recusal the applicants have to show that they entertain an apprehension of bias on the part of the court which apprehension is reasonable. See *Monnig and Others v Council of Review and Others 1989(4)SA 866(C) at 876B-879I, 1992(3) SA 482(A) at 495A-D, S v Malindi 1990(1) SA 962 (A) at 969G-970D, BTR Industries SA (Pty) Ltd v Metal and Allied Workers= Union 1992(3)SA 673 (A) at 688E-695B, Moch v Nedtravel (Pty) Ltd t/a*

American Express Travel Service 1996(3)SA 1 (A) at 8H-I, Absa Bank Ltd v Hoberman and Others 1998 (2) SA 781 (C) at 795C -800H, President of the Republic of South Africa and Others v SA Rugby Football Union and Others 1999(7) BCLR 725 (CC) (the >Sarfu= judgement).

[26] It seems clear that the decision in this matter is one to be made by the whole court, not just the judges whose recusal is sought. See the Sarfu judgement op. cit. page 747 A-C. There is no rule in South Africa which lays down that a Judge, in cases other than appeals from his judgment, is disqualified from sitting in a case merely because in the course of his judicial duties he has previously expressed an opinion in that case. See *R v T 1953(2) SA 478 (A) at 482G-483G.* The court held in that case that in the case of a trained judicial officer the mere possibility of bias not based on a previous extra-judicial opinion in relation to the case he is going to try or on his hostility or relationship to or intimate friendship with one of the parties or on an interest in the case, does not disqualify him from trying the case. In that case a magistrate, who had convicted the female accused of contravening section 2 of Act 5 of 1927 (the Immorality Act), had thereafter refused to recuse himself from trying the case against the male accused in which the convicted female was

a witness. It was held that such magistrate was not disqualified from trying the case.

[27] Mr Arendse, who appeared for the applicants, together with Mr Grobler and Miss Fourie, sought to distinguish R v T (supra) on the basis of the decision in *S v Somciza 1990 (1) SA 361 (AD) at 366A-G*. In that case the court considered the re-trial before the *same* magistrate of an accused, whose conviction and sentence by that magistrate had been set aside by the High Court. The Supreme Court of Appeal distinguished R v T on the basis that a different accused was being tried and that the court in Somciza=s case was dealing with the same accused whose case had been referred back to the same magistrate for the accused to give evidence. The magistrate had made positive credibility findings of the State witnesses which would not engender any confidence in an accused, who had still to give his evidence. It is clear that in Somciza=s case the magistrate was dealing with the same set of facts. In this application the comments set out above in the judgement in the Nomoyi matter deal with the same personalities - for example the members of the respondent company and the trade union officials, in some instances (save for the employees, who are different), but with different sets of events. It does not seem to me

that Somciza=s case assists the applicants.

[28] Reference was also made by Mr Arendse to Moch=s case (supra) in which the facts were totally different. The petitioner (appellant) had been the respondent in an application in a Local Division for the sequestration of her estate. At a certain stage in the proceedings before the provisional order of sequestration was granted, the appellant brought an application for the recusal of the presiding Judge. The application was based on information she had gained concerning the strained relationship between the presiding Judge and her attorney. The application for the recusal of the presiding Judge was heard by him and dismissed. The application for a provisional order of sequestration was then dealt with and a provisional order granted. On the return day the matter came before another Judge and a final order was granted, there having been no appearance for the appellant. An application for leave to appeal against the provisional order of sequestration and the refusal of the application for recusal was dismissed. It was held that it was for the appellant (petitioner) to satisfy the Court that the grounds for her application were not *frivolae causae*, i.e. that they were legally sufficient to justify the recusal of the presiding Judge. (At 12G/H-H.) It was held, further, that it was not

necessary to deal with the presiding Judge's finding that the application for his recusal 'was contrived and frivolous, and not based on a *bona fide* and honest belief of a probability of bias on (his) part' as the way in which the presiding Judge handled the recusal application disqualified him, irrespective of its merits and demerits, from proceeding with the sequestration application: on this view it was unnecessary to consider either the factual proof or the legal sufficiency of the grounds for the recusal application. (At 13D-E.)

[29] The Supreme Court of Appeal found that a reading of the record left one in no doubt that the presiding Judge found the application for his recusal highly offending and regarded it as an assailment of his personal integrity. (At 13E-E/F.)

[30] It was in that context therefore that the Supreme Court of Appeal held that, when during argument in the recusal application the presiding Judge forcefully brought it home to the appellant's counsel that she could not be believed, she at that stage already had every reason to despair of her evidence being accepted in the main proceedings; and having regard to the presiding Judge's rejection in his judgment of the most material part of her founding affidavit, effectively finding her to

have been a perjurer who had deliberately attempted to deceive him, the appellant could have had no confidence that her evidence in the main proceedings had been considered with an open mind. (At 15H/I-J.)

[31] The situation in Moch=s case differs *toto caelo* from this matter. The Nomoyi judgement was delivered on appeal after a full ventilation of the relevant issues in the industrial court. It dealt with different employees and different events, though the events of 21 June 1995 (relevant for the Nkatu appeal) formed part of the background. No reliance is placed on the manner in which the application for recusal was dealt with in this matter.

[32] Mr Arendse also submitted that the case of R v T was decided under the court=s common law jurisdiction and that there is a fundamental difference under the new constitution. The difficulty I have with this argument is that the Constitutional Court dealt with a recusal application in the SARFU matter in the light of the relevant sections of the constitution and, apart from preferring the phrase >apprehension of bias= to a >suspicion of bias=, approved the test as applied under the common law.

[33] Trade unions and companies are frequent litigants in the courts. Only the morbidly pessimistic or the unrepentant cynic would believe that a finding against one or the other on one occasion will necessarily imply that they are stigmatized as mendacious on subsequent occasions. It is one of the attributes of a trained judicial officer that he views afresh the witnesses in each case. It has been held that it would be impossible to conduct the administration of justice in a proper way if judicial officers recused themselves because at some prior time they expressed unfavourable opinions in court about persons who subsequently came before them. See *R v Heilbron 1922 TPD 99 at 100, Law Society v Steyn 1923 SWA 59 at 60 and Miller and Another v Magennis 1924 CPD 295 at 298*.

[34] The problem alluded to in the previous paragraph is compounded in the Labour Court and the Labour Appeal Court. The judges who preside in these courts are limited in number. Of necessity judges deal regularly with the same unions and companies and in many instances the same officials and office bearers. Apart from the principles enunciated above with regard to the training of judicial officers to look afresh at every case, vast logistical difficulties would attend upon recusal at the instance of a party whose witnesses have been

disbelieved on some prior occasion.

[35] The practical problems mentioned should not, however, mask the true enquiry in every case namely whether there is a reasonable apprehension of bias. We have considered this question most anxiously and can find no evidence for it. On the authority of the case law set out above there is no basis for recusal. The adverse findings against the first applicant and Ms Holland are, in any event, of very little relevance in the present appeal. I have made mention of the main points advanced by the appellants= counsel in the heads of argument. The first applicant and Ms Holland play very little if any part in the events which enfolded on 21 June. The actions were initiated by Nkatu and the officials of first applicant only made their appearance on the scene later in the day. The officials of first applicant were not eye witnesses to the actions of the employees during the march. Any positive credibility findings with regard to the respondent=s witnesses concerning the events of 21 June were made in the context of their evidence being uncontroverted. The application therefore falls to be dismissed with costs, including those attendant upon the employment of two counsel.

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Nicholson JA

I agree.

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Conradie JA

I agree.

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Mogoeng AJA

Date of hearing 31 August 1999

Date of judgement September 1999

Appearance for applicants	Adv N Arendse SC, Adv Grobler and Adv Fourie
Appearance for respondent	Adv Rose-Innes SC